THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.45 of 2005

February 12, 2014

Between:

Smt.Nadendla Kotamma, W/o.Mallaiah
And others

... Appellants/
Appellants/Plaintiffs

AND

Nadendla Mallaiah (died)
And another

... Respondents/
Respondents/Defendants

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.45 of 2005

JUDGMENT:

This second appeal is preferred by the unsuccessful plaintiffs challenging the decree and judgment dated 17.9.2004 passed in A.S.No.45 of 1998 on the file of V Additional District Judge (Fast Track Court), Guntur, confirming in appeal the decree and judgment dated 16.1.1998 in O.S.No.136 of 1981 on the file of Additional Senior Civil Judge Court, Narasaraopet. To avoid confusion, the parties will hereinafter be referred to as they are arrayed in the suit. Originally the first plaintiff filed the suit and pending suit, her sister (second plaintiff) and sister's children (plaintiff Nos.3 and 4) have come on record.

2. The case of the plaintiffs is that Nadendla Kotamma (hereafter referred to as, plaintiff), and second defendant, Alluri Nagaiah, are the daughter and son of Alluri Narasaiah; and first defendant is the husband of plaintiff. After marriage with plaintiff,

first defendant started staying in his in-laws' house. At the instance of Narasaiah, one Gonuguntla Narasaiah executed a sale deed in respect of 'A' schedule property admeasuring Ac.1.99 cents, in the name of the first defendant. The first defendant is only benamidar of the father of plaintiff. Thereafter the plaintiff started living separately from her father. Alluri Narasaiah gifted some other property to first defendant in the year 1940. The plaintiff and first defendant purchased the suit schedule properties out of their income. They were not blessed with children. The second defendant, with an evil motive, created disputes between the plaintiff and first defendant. The first defendant, without consent or knowledge of plaintiff, executed a settlement deed in respect of 'A' schedule property and 'C' schedule house in favour of second defendant. The settlement deed is invalid one and does not bind the plaintiff. The plaintiff got issued a notice to the second defendant. The first defendant died on 27.10.1981; therefore the plaintiff alone is the legal heir of the first defendant. The plaintiff became absolute owner of plaint 'A' schedule property in view of the provisions of the Hindu Succession Act. The second defendant came into wrongful possession of the property, taking advantage of the registered settlement deed dated 07.5.1980. Hence the suit for declaration.

3. The second defendant filed written statement *inter alia* contending that the plea of benami transaction, as contended by the plaintiff, is not permissible in view of Act 45 of 1988. The plaintiff is a party to the settlement deed dated 07.5.1980 in respect of plaint 'A', 'B' and 'C' schedule properties. The second defendant took possession of the house property and he is

enjoying it with absolute rights. The sale deed dated 06.7.1936 in the name of the first defendant is not a benami transaction. During the life time of first defendant, the plaintiff never sought for cancellation of the gift deed. The plaintiff was never in joint possession of items-2 and 3 of plaint 'C' schedule property with the first defendant. The second defendant filed additional written statement after plaintiffs 2 to 4 were brought on record as legal representatives of the first plaintiff, *inter alia* contending that they are not entitled to the suit schedule properties. The defendant Nos.2 to 4 are neither necessary nor proper parties to the suit. Hence the suit may be dismissed.

4. Basing on the above pleadings, the trial court framed the following issues.

1. Whether the plaintiff is entitled to the possession of the suit daba house?
2. Whether the Will set up by the defendant is true and valid?
3. To what relief?

Additional issue:

Whether the contract of sale set up by the defendant in O.S. No.280/83 is true and valid?

5. In the trial court, on behalf of the plaintiff, P.Ws.1 to 8 were examined and Exs.A1 to A28 were marked. On behalf of the defendants, D.Ws.1 to 7 were examined and Exs.B1 to B16(B), Exs.C1 to C22 and Ex.X1 were marked.

6. After analyzing the oral, documentary evidence and other material available on record, the trial court arrived at a conclusion that the plaintiff is not entitled to the relief of declaration and recovery of possession of plaint schedule property and dismissed the suit. Feeling aggrieved, the unsuccessful plaintiffs preferred A.S.No.45 of 1998 on the file of the V Additional District Judge

(Fast Track Court) , Guntur and the same was dismissed. Aggrieved by the decree and judgment of the first appellate court, the unsuccessful plaintiffs preferred this second appeal.

7. After hearing the learned counsel for both the parties, this court framed the following question of law.

Whether the findings of the courts below are perverse?

8. Heard Sri A.Manoj Kumar, Advocate representing Sri Ghanta Rama Rao, learned senior counsel for appellants and Sri S.Ganesh, Advocate representing Sri N.Vijay, learned counsel for second respondent/second defendant.

Point:

9. The contention of learned counsel for the appellants/plaintiffs is that the courts below have not considered Exs.A1, A2, B9 and B11 in right perspective. Per contra, the learned counsel for respondent/second defendant submitted that there is no question of law in this appeal.

10. In the trial court, the first plaintiff examined herself as P.W.1 and got marked Exs.A1 to A28. P.Ws.2 and 3 were examined to prove that the plaintiff and first defendant are in possession of an extent of Acs.2.00 of land and house property. P.Ws.4 and 5 were examined to prove the agreements of sale executed in their favour in respect of portions of paint schedule properties. P.W.6 is the scribe of Ex.B9 Will. P.W.8 is the Handwriting expert who examined Ex.A4 agreement of sale and gave opinion. To dislodge the case of the plaintiffs, third defendant examined himself as D.W.1 and got marked Exs.B1 to B16(B), Exs.C1 to C22 and

Ex.X1. D.Ws.2 and 3 were examined to prove Ex.B9 Will. D.W.4 is an Expert who gave opinion on Ex.B9 Will. D.Ws.5 and 6 are the attestors of Ex.B11 Settlement deed (copy of which is marked as Ex.A2). D.W.7 was examined to support the case of the defendants.

11. In a suit for declaration, the plaintiff may succeed or fail basing on the strength or weakness of his/her case. The court cannot grant the relief of declaration basing on the laches or lacunae if any on the part of the defendant. The plaintiff is the daughter and second defendant is the son of Alluri Narasaiah. The first defendant is the husband of plaintiff. The plaintiff is seeking declaration in respect of item-1 of plaint 'C' schedule property and permanent injunction in respect of items-2 and 3 of plaint 'C' schedule properties and plaint 'A' schedule property. The entire case revolves around Exs.A1 sale deed, Ex.A2/B11 Settlement deed and Ex.B9 Will.

12. As per the testimony of P.W.1, her father purchased the landed property under the original of Ex.A1 dated 13.7.1936 in the name of first defendant. The first defendant is a benamidar and the conveyance is intended for the benefit of the plaintiff. Due to some disputes, P.W.1 left the house of her father. She further stated that herself and her husband (first defendant) purchased vacant site and constructed daba house, which is one of the suit schedule properties. In the cross-examination, P.W.1 has given a different version with regard to the money secured for construction of the house. It appears that there were disputes between herself and her brother (second defendant). Except self-served testimony of P.W.1, there is no other convincing evidence to establish that

the house was constructed out of the earnings of herself and her husband. A perusal of Ex.A1 certified copy of sale deed dated 13.7.1936 reveals that the first defendant alone has paid the sale consideration to the vendor. Unless and until the contrary is proved the court can place reliance on the recitals of a registered document. Mere assertion by itself is not sufficient to substantiate the stand of plaintiff to treat the first defendant as benamidar under Ex.A1 sale deed. The plaintiff failed to establish that her father has paid the sale consideration under Ex.A1.

13. A perusal of Ex.B10 Registration extract of gift deed dated 14.5.1940 reveals that the father of plaintiff executed gift deed in favour of first defendant. The plaintiff has no right whatsoever to challenge this document, after lapse of 40 years. The plaintiff is attacking the validity of Ex.B9 Will executed by first defendant in favour of second defendant. Generally the propounder of a Will has to prove its valid execution by examining at least one attesting witness as provided under Section 68 of Indian Evidence Act read with Section 63(c) of Indian Succession Act. If there are any suspicious circumstances surrounding its execution, the propounder must remove such circumstances from the mind of the court by adducing cogent and convincing evidence. The oral testimony of D.Ws.2 and 3 clearly reveals that they attested Ex.B9 Will in the presence of the first defendant. Their testimony further reveals that first defendant affixed his thumb mark on the Will after its contents read over to him. Their testimony also reveals that the first defendant was in a sound and disposing state of mind at the time of execution. The contention of the plaintiff is that Ex.B9 does not bear the thumb mark of the first defendant. As per the

testimony of P.W.6, the scribe of the Will, first defendant did not put his thumb mark on Ex.B9 Will in his presence. His testimony further reveals that the attestors also did not subscribe their signatures on Ex.B9 in his presence. For obvious reasons, P.W.6 was examined on behalf of the plaintiff to disprove the execution of Ex.B9 Will. If really first defendant was not present, what prompted him to scribe the Will.

14. A 'Will' is a compulsorily attestable document. 'Attestation' as provided under Section 3 of the Transfer of Property Act, means two or more witnesses has seen the executant signing or affixing his mark to the instrument. In the cross-examination of D.Ws.2 and 3, nothing is elicited to shake their testimony so far as proper execution of Ex.B9 is concerned. The testimony of D.Ws.2 and 3 inspired the confidence of the court, therefore, much weight cannot be attached to the testimony of P.W.6. Even otherwise, as seen from the testimony of D.W.4, he examined the disputed impression on Ex.B9 with the admitted impression and gave opinion that the disputed impression is tallied with admitted impression. Ex.B9 bears the thumb impression of the first defendant.

15. It is an admitted case that the first defendant and plaintiff were not blessed with children and they have not adopted any child. The material available on record clearly reveals that the plaintiff is supporting plaintiff Nos.2 to 4 whereas the first defendant is supporting second defendant, who is none other than own brother of plaintiff. If a person executes a Will bequeathing property in favour of an unknown person or distant relative by ignoring the family members, the court may doubt its validity. In

the present case, the first defendant executed Ex.B9 Will in favour of own brother of the plaintiff. Therefore, the irresistible conclusion that can be drawn is that first defendant executed Ex.B9 Will in favour of second defendant in a sound and disposing state of mind apart from on his volition.

16. The other contention of the plaintiff is that Ex.B11/Ex.A2 settlement deed executed by first defendant in favour of second defendant is not legally enforceable. Being an attestable document, Ex.B11 can be proved by examining one of the attestors. As per the evidence of D.Ws.5 and 6, first defendant executed settlement deed in favour of second defendant on 07.5.1980. Their testimony clearly reveals that the first defendant affixed his thumb mark after satisfying with the contents of settlement deed. In the cross-examination of D.Ws.5 and 6, nothing is elicited to shake their testimony so far as the execution of the settlement deed by the first defendant and also their presence at the time of its execution. The court cannot cancel a registered document unless the same was obtained by playing fraud or mischief. The burden to establish such fraud is on the person who asserts the same. The plaintiff failed to establish that the second defendant obtained Ex.A2 by playing fraud. Further, the first defendant created life interest in favour of the plaintiff and vested remainder in favour of second defendant. This also clearly established that the first defendant has taken reasonable care to enjoy the fruits of plaint 'B' schedule property during her life time by the plaintiff. Even as per the opinion of D.W.4, E.B11 bears the thumb mark of first defendant. The plaintiff miserably failed to prove that Ex.A2/B11 is not legally enforceable.

17. In the light of the foregoing discussion, I have no hesitation to hold that the plaintiff failed to establish her case. Therefore, the plaintiff is not entitled for the reliefs sought by her.

18. The plaintiff Nos.2 to 4 are the appellants in this second appeal. The first appellant/first plaintiff died on 15.1.2009. It is reported that first appellant's legal heirs are on record. As per the contentions of the plaintiffs, P.W.4, by name, Chinthala Venkata Subbaiah, purchased the property under an unregistered agreement of sale (Ex.A4). The defendants herein filed filed O.S.No.280 of 1983 against P.W.4 for permanent injunction restraining him from interfering with their possession and enjoyment of the property covered under Ex.A4. P.W.4 resisted the suit basing on Ex.A4 unregistered agreement of sale. After fullfledged trial, the trial court decreed O.S.No.280 of 1983. P.W.4 preferred A.S.No.58 of 1998 on the file of V Additional District Judge (Fast Track Court) , Guntur, which was also dismissed. P.W.4 preferred S.A.No.46 of 2005, which was also dismissed by this Court on 11.12.2005 at the stage of admission. In view of the decree and judgment in S.A.No.46 of 2005, the plaintiff Nos.2 to 4 are entitled to protection under Section 53-A of the Transfer of Property Act, basing on Ex.A4.

19. The courts below meticulously scrutinizing the oral and documentary evidence arrived at a conclusion that the suit is not liable to be dismissed. The courts below have assigned cogent and valid reasons to its findings. A perusal of the record clearly manifests that the findings recorded by the courts below are based on sound principles of law. Viewed from factual or legal aspects,

the findings recorded by the courts below are not perverse. I am fully agreeing with the findings recorded by the courts below. There is no question of law much less substantial question of law involved in this appeal.

20. In the result, the second appeal is dismissed, confirming the decree and judgment dated 17.9.2004 passed in A.S.No.45 of 1998 on the file of V Additional District Judge, Guntur. There shall be no order as to costs.

21. The miscellaneous petitions pending if any in this second appeal shall stand closed.

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(**T.SUNIL CHOWDARY, J**)

12th February, 2014.

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